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## Public Institutions as Defamation Plaintiffs

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*This article focuses on public institutions' ability to sue in defamation. It has a descriptive and a normative section. The descriptive part begins with an analysis of the relevant law in several common law jurisdictions. The state of Canadian law is then examined. The normative section considers which public institutions should be prohibited from suing in defamation and why. Whereas some case law suggests that a prohibition on public institution defamation actions should be grounded in the public importance of speech about such institutions, this article takes the position that that is unprincipled. Instead, the focus is on factors such as the nature of an institution's reputation and the dangers of public institutions having an enforceable right to be well thought of. It is argued that a prohibition on a broad range of public institutions is justifiable, and the merits are considered of a rule that would deny standing to sue to all institutions subject to access to information law.*

*Cet article traite de la capacité des institutions publiques à intenter une poursuite en diffamation. Il comporte une section descriptive et une section normative. La partie descriptive commence par une analyse du droit pertinent dans plusieurs ressorts de common law, suivie d'un examen du droit canadien. Dans la section normative, l'auteure se demande à quelles institutions publiques il devrait être interdit d'intenter une action en diffamation et pourquoi. Alors que certains arrêts suggèrent que pour une institution publique, l'interdiction d'intenter une poursuite en diffamation doit être fondée sur l'importance, pour le public, du discours sur ces institutions, l'auteure adopte la position que cela ne repose sur aucun principe. Au lieu de cela, elle met l'accent sur des facteurs tels que la réputation d'une institution et les dangers liés au fait que des institutions publiques aient le droit exécutoire d'être bien vues. Elle allègue que l'interdiction faite à un large éventail d'institutions publiques est justifiable et examine le bien-fondé d'une règle qui nierait le droit de poursuivre en justice à toutes les institutions assujetties aux lois sur l'accès à l'information.*

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*Introduction*

It is reasonably well settled in Canadian common law that governments cannot bring defamation actions against citizens. Although there are only trial level cases from two provinces establishing that proposition,<sup>1</sup> the cases are consistent with each other and with the law in other common law jurisdictions. That said, uncertainty remains about the scope of the rule—what counts as government for the purposes of the rule. This is because of a lack of case law, and because the few cases on point rely on different rationales, including the chilling effect of defamation actions on democratic discourse, the public nature of a government's reputation and the fact that governments generally have the ability to speak out to try to correct misinformation about themselves. This article examines the law in other common law countries and Canada with two goals in mind:

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1. *Montague (Township of) v Page*, [2006] OJ No 331, 79 OR (3d) 515 [*Montague*]; *Halton Hills (Town of) v Kerouac*, [2006] OJ No 1473, 80 OR (3d) 577 [*Halton Hills*]; *Dixon v Powell River (City of)*, 2009 BCSC 406; 94 BCLR (4th) 106 [*Dixon*].

first, to understand the current Canadian law with regard to governments' and other public bodies' ability to sue in defamation, and second, to ground a normative analysis. Specifically, it assesses how the rule against government defamation actions should be applied to public institutions such as school boards, police forces and Crown corporations.

Although it is unusual for federal, provincial or municipal governments to bring defamation actions, other public institutions *do* bring them.<sup>2</sup> Further, even if there were few such actions, the possibility raises important questions about the nature of a public institution's reputation and the role of defamation law in a modern democracy. It is presumably for this reason that Mahoney J.A. considered the issue of whether a public authority could sue in defamation to be one of the most important to be decided by the New South Wales Court of Appeal in recent years.<sup>3</sup>

The analysis supports a broad prohibition on public institution defamation actions. Although the particular place in which the line is drawn will always be somewhat arbitrary, one proposal for delineating the scope of the rule is by reference to access to information law. Institutions subject to access to information requests under federal and provincial law could be denied standing to sue in defamation. This would not preclude other public or political non-human entities, such as political parties, from being denied standing to sue. Rather, it is a suggestion for one way in which to define "public body" for the purposes of the rule against public body defamation actions. This admittedly broad prohibition is justified in a number of ways, but especially with regard to the nature of public institutions' interest in reputation: the author has argued elsewhere that non-human entities such as corporations have diminished reputational interests and should not be entitled to sue in defamation. The argument is even stronger in relation to public bodies. A broad prohibition is also justified with regard to the importance of speech about such institutions, the limitations of defamation defences in protecting speech on matters of public interest, and the ability of public institutions to communicate with citizens to try to correct misinformation.

The article begins by considering how various common law jurisdictions have dealt with the issue of governments and public authorities as defamation plaintiffs. This background helps in understanding Canada's approach, which often references other jurisdictions' case law

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2. See e.g. *Hall v Regina School Division No 4 of Saskatchewan*, 2009 SKCA 118, 343 Sask R 268 [Hall]; *Windsor Roman Catholic Separate School Board v Southam Inc.*, [1984] OJ No 3193, 46 OR (2d) 231 [Windsor]; *Kenora (Town of) Police Services Board v Savino*, [1995] OJ No 486, 36 CPC (3d) 46 [Kenora].

3. *Ballina Shire Council v Ringland*, [1994] 33 NSWLR 680 [Ballina] at 147-148.

but is unique by virtue of the *Canadian Charter of Rights and Freedoms*.<sup>4</sup> In most jurisdictions, the prohibition on government defamation actions, including those brought by municipalities, is clear, but its application to public institutions is much less so. Thus, in the second part of the article, the rationales for such a prohibition are assessed, leading to the conclusion that a prohibition on defamation actions should apply to a wide range of public institutions.

# I. *Governments as defamation plaintiffs in common law jurisdictions*

## 1. *South Africa*<sup>5</sup>

South Africa has long prohibited defamation actions brought by government. In *Die Spoorbond and Another v. South African Railways*,<sup>6</sup> a newspaper article accused the state railway of allowing trains to be dangerously overloaded and to speed, causing a risk to public safety. The railway alleged libel. At issue in the appeal was whether the plaintiff could bring a defamation action at all. The South African Supreme Court of Appeal held that, since the railway was considered to be the Crown, it could not—at least in the absence of economic loss:

[subject to exceptions] any subject is free to express his opinion upon the management of the country's affairs without fear of legal consequences. I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticized or condemned the management of the country.<sup>7</sup>

The Supreme Court of Appeal rejected the plaintiff's argument that if a trading corporation could sue in defamation, so too could it. The Crown was considered meaningfully different than trading corporations: its reputation is less affected by the acts of individual decision-makers.<sup>8</sup> Rather, it is the reputations of individuals affiliated with the government

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5. South Africa has civil and common law traditions, but its defamation laws have much in common with those in other common law countries.

6. *Die Spoorbond and Another v South African Railways*, [1946] 994 AD (S Afr PC) (South Africa) [*Die Spoorbond*].

7. *Ibid* at 1013.

8. *Ibid* at 1009: "[T]he Crown's...reputation...is not a frail thing connected with or attached to the actions of the individuals who temporarily direct or manage some particular one of the many activities in which the Government engages..."

that are more likely to be injured, and these individuals maintain a right of action.<sup>9</sup>

## 2. *The United States*

Not surprisingly, given its extensive free speech protections, the United States also prohibits defamation actions brought by governments. In *City of Chicago v. Tribune Co.*, the defendant newspaper had published articles alleging that the City of Chicago was near bankruptcy. The City claimed this affected its “credit and financial standing.” Thompson C.J. held that governments, including municipal governments, could not sue citizens in libel.<sup>10</sup>

The Illinois Supreme Court’s ruling rested on two grounds. The first related to the republican form of government, in which the people are said to be sovereign. Governments are servants of the people and the people therefore have a right to criticize them. This is in contrast to government based on the divine right of kings.<sup>11</sup> Given the sovereignty of the people rather than the head of state, speech critical of government enjoys an absolute privilege unless it advocates law-breaking or violent overthrow of the government.<sup>12</sup> The second ground was the rejection of any distinction between criminal and civil libel. If governments cannot hold citizens criminally responsible for libel without running afoul of the First Amendment, neither can they sue citizens civilly. In fact, the Illinois Supreme Court noted that a civil action may be more speech-infringing than a criminal prosecution.<sup>13</sup>

Just as the South African Supreme Court of Appeal rejected the analogy to trading corporations, the Illinois Supreme Court rejected the plaintiff’s argument that the government should be allowed to sue with regard to its “private” capacity as a landowner, for example. The argument was that the impugned statement related to Chicago’s credit-worthiness, which affected its ability to borrow money (among other consequences) in the same way as it would affect any corporate entity. However, Thompson C.J. held that: “no distinction can be made with respect to the proprietary and governmental capacities of a city.”<sup>14</sup> On the contrary, the more property a government owns, the more important it is for citizens to be able to speak freely about how that property is being managed because the potential

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9. *Ibid* at 1005.

10. *Chicago (City of) v Tribune Co.*, 139 NE 86 (SC IL 1923) [*Chicago*] at 86.

11. *Ibid* at 88.

12. *Ibid* at 90.

13. *Ibid*.

14. *Ibid* at 91.

for corruption is greater.<sup>15</sup> The Court therefore held that speech about municipal corporations enjoys an absolute privilege.<sup>16</sup>

Later, in *New York Times Co v. Sullivan*, the US Supreme Court constitutionalized libel law, holding that actual malice is required for liability where the plaintiff is a public official (and it is now required for all public figures).<sup>17</sup> I will return to the issue of public officials (as opposed to institutions), but on the question of government defamation actions, the United States Supreme Court cited *Chicago* stating that they are always prohibited:

no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence. *City of Chicago v. Tribune Co.*, 307....<sup>18</sup>

It has therefore long been clear that U.S. citizens enjoy an absolute privilege to criticize their government, including municipalities, so long as such criticism does not amount to sedition. Further, the privilege is guaranteed by the First Amendment to the U.S. Constitution. This privilege extends to public institutions including police forces,<sup>19</sup> public schools,<sup>20</sup> park districts,<sup>21</sup> and even public benefit pari-mutuel betting schemes.<sup>22</sup> However, the cases contain little discussion of what counts as government for the purposes of the privilege.

Whereas many other jurisdictions justify the prohibition in part because individuals affiliated with government retain the right to sue (as discussed below), it is not clear that that is the case in the United States. A reference to a government body will, it seems, *never* constitute a reference to one of the members or employees of that body for the purposes of the colloquium element.<sup>23</sup>

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15. *Ibid.*

16. *Ibid* at 90.

17. *New York Times Co v Sullivan*, 376 US 254 (1964) [Sullivan]. In *Gertz v Robert Welch, Inc*, 418 US 323 (1974) [Gertz], the court expanded the requirement of actual malice to all public figures, not just public officials.

18. *Sullivan*, *ibid* at 291. See also at 277.

19. *Edgartown Police Patrolmen's Association v Johnson*, 522 F Supp 1149 (D MA 1981).

20. *American Civil Liberties Union of Minnesota v Tarek ibn Ziyad Academy*, 2009 US Dist LEXIS 114738 (D MN 2009).

21. *Progress Development Corporation v Mitchell*, 219 F Supp 156 (ND IL 1963).

22. *Capital District Regional Off-Track Betting Corporation v Northeastern Harness Horsemen's Association*, 399 NYS (2d) 597 (1977).

23. *Sullivan*, *supra* note 17 at 292. See also *Dean v Dearing*, 561 SE (2d) 686 (SC VA 2002).

### 3. *The United Kingdom*

The United Kingdom's leading case on government defamation actions is *Derbyshire CC v. Times Newspapers Ltd.*<sup>24</sup> In that case, the House of Lords noted that there had only been two reported decisions in which a local authority had sued in libel, neither of which dealt specifically with the issue of whether government bodies, as such, are able to sue in defamation.<sup>25</sup>

In holding that governments, including local councils, could not bring defamation actions, the House of Lords stated:

It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.<sup>26</sup>

The House of Lords cited *Chicago* with approval. Although noting the different constitutional contexts between the United States and the United Kingdom, the House of Lords nevertheless held that the “public interest concerns” underlying the rule in *Chicago* applied equally to the United Kingdom.<sup>27</sup> Lord Keith concluded that: “not only is there no public interest favouring the right of organs of government, whether central or local, to sue for libel, but that it is contrary to the public interest that they should have it.”<sup>28</sup>

In response to concerns that the rule was unfair, the House of Lords noted that individuals affiliated with government retain the right to sue in relation to their own reputations.<sup>29</sup> In addition, governments tend to have the ability to convey their own message, and thereby attempt to correct any misinformation.<sup>30</sup> Lord Keith declined to address whether Article 10 of the European Court of Human Rights, which protects freedom of expression, would have led to the same conclusion.<sup>31</sup> The case was decided solely on the basis of the common law.

24. *Derbyshire County Council v Times Newspapers Ltd*, [1993] AC 534, (HL) (Eng) [*Derbyshire*].

25. *Ibid* at 544. The first case was *Manchester Corporation v Williams*, [1891] 1 QB 94. It held that a local council could not succeed because corporations may only sue for libels affecting property, whereas the claim alleged a libel affecting personal reputation. The logic was not that governments cannot sue because they are government. Rather, it was that the allegation in question was one “of bribery and corruption, of which a corporation cannot possibly be guilty.” The second case was *Bognor Regis Urban District Council v Campion*, [1972] 2 QB 169 [*Bognor*]. It held that a district council could bring a defamation action but did not consider whether a local council might have different rights than other corporations on the basis that it has governmental functions.

26. *Derbyshire*, *supra* note 24 at 547.

27. *Ibid* at 548.

28. *Ibid* at 549.

29. *Ibid* at 550.

30. *Ibid*.

31. See *Derbyshire*, *supra* note 24 at 551.



The application of *Derbyshire* to public institutions other than municipalities remains unclear. Lord Keith referred not only to the importance of uninhibited speech about *elected* bodies, but also of “any governmental body.” In general, *Derbyshire* has been interpreted broadly. Its prohibition on defamation actions was later applied to the British Coal Corporation, an unelected public body, on the basis that a democratically elected government had close control over it.<sup>32</sup>

Further, in *Goldsmith v. Bhojru*,<sup>33</sup> the Court of Queen’s Bench relied on *Derbyshire* in holding that political parties cannot sue in defamation. Although the plaintiff attempted to distinguish *Derbyshire* on the basis that political parties were neither government nor elected bodies, the Court was not persuaded. It reasoned that: “the public interest in free speech and criticism in respect of those bodies putting themselves forward for office or to govern is also sufficiently strong to justify withholding the right to sue.”<sup>34</sup> As in *Derbyshire*, the court also noted that individuals retain the right to sue and that political parties can “answer back.”<sup>35</sup>

Finally, the argument that a university should not be allowed to sue in defamation was rejected in *Duke v. The University of Salford*,<sup>36</sup> despite the defendant’s attempt to analogize the university to a government body per *Derbyshire*. Eady J. noted that it is not the government’s function to provide higher education.<sup>37</sup> In support of his conclusion, Eady J cited a case from Hong Kong:

In my judgment, the considerations which govern a body like a university are far removed from those in the *Derbyshire County Council* case. In no way does the University take part in the government of Hong Kong. It is not an organ of government, democratically elected or otherwise. If public interest be the test, I would hold that it strongly favours the protection of the reputation of institutions of learning like the University.<sup>38</sup>

Interestingly, however, the action was disallowed on the grounds of “*Jameel* abuse” (essentially an abuse of process) because the Court concluded that the statements in question were really about two individuals rather than about the university. Although it is possible to have both the

32. *British Coal Corporation v National Union of Mineworkers and Another*, [1996] EWHC 380 (98). See *Steel v McDonald’s Corp.*, [1997] EWHC 366 (98) at 19 (CA 1999), which discusses *British Coal*.

33. *Goldsmith and Another v Bhojru and Others*, [1998] QB 459 (QB) [*Goldsmith*].

34. *Ibid* at 463.

35. *Ibid*.

36. *Duke v The University of Salford*, [2013] EWHC 196 (QB).

37. *Ibid* at para 3.

38. *Ibid* at para 4 citing *Hong Kong Polytechnic University v Next Magazine Publishing Ltd*, [1997] 7 HKPLR 286 at 291.

university and its employees implicated by the same statement, Eady J. held that in this case, no “real or substantive tort has been perpetrated against the University.”<sup>39</sup>

#### 4. *Australia*

Australia too prohibits defamation actions brought by governments and at least some public institutions. The first case to consider the issue was *Ballina Shire Council v. Ringland*,<sup>40</sup> in which a majority of the New South Wales Court of Appeal held that municipal councils could not sue in defamation, although they retain the right to sue in injurious falsehood. Both Gleeson C.J. and Kirby P., in concurring judgments, found the reasoning in *Derbyshire* persuasive. Gleeson C.J. cited Lord Keith’s passage: “[i]t is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism.”<sup>41</sup> He then stated that the “essence of the reasoning” in *Derbyshire* was the “inconsistency between the principles which underlie the law of defamation, and our assumptions as to the nature and role of democratically elected governmental institutions.”<sup>42</sup> As in *Derbyshire*, the court in *Ballina* emphasized that any unfairness in the rule is mitigated by the fact that natural persons affiliated with government can sue in relation to their own reputations, and that institutions can publicize their own views.<sup>43</sup>

Gleeson C.J. explicitly declined to state whether the ruling applied only to elected or also to unelected public bodies.<sup>44</sup> He also noted that since the plaintiff council’s claim related to criticisms of its governmental and administrative functions, the Court did not need to determine whether public bodies were equally precluded from suing in relation to criticisms that related to matters other than governmental and administrative functions.<sup>45</sup>

There was a strong dissent by Mahoney J.A., who rejected what he referred to as the majority’s “free speech principle” as being too broad. In essence, he said, the court was concluding that public bodies cannot sue in defamation because of the importance of unfettered speech about them. If that is so, he did not see how such a principle could be confined to elected government bodies. It would seem to apply equally to politicians

39. *Ibid* at para 26.

40. *Ballina*, *supra* note 3.

41. *Ibid* at 124.

42. *Ibid* at 125.

43. See *ibid* at 119, 135, 140, 141.

44. *Ibid* at 118-119.

45. *Ibid* at 119.

and employees of public authorities, and would also seem to apply to defamation claims funded by governments (those brought by government employees, for example).<sup>46</sup> Although these concerns were expressed in dissent, they are reflected in Canadian case law and may influence the development of that law as it applies to public institutions.

Four years later, in *New South Wales Aboriginal Land Council v. Jones*,<sup>47</sup> the Supreme Court of New South Wales clarified some of the uncertainty in *Ballina*. It interpreted the rule in *Ballina* as limited to “democratically elected bod[ies] exercising governmental powers.”<sup>48</sup> Two of the three judges held that the New South Wales Aboriginal Land Council was such a body. The majority noted that the plaintiff’s functions “include administering its funds, making grants to [other aboriginal land councils], the acquisition of land, making claims to Crown land, and the supervision of [other aboriginal land councils] to ensure their compliance with the Act”<sup>49</sup> It also noted that the government retained some control over the plaintiff, that it must report to the Minister by providing budgets, answering questions and submitting requested reports.<sup>50</sup> Handley J.A., for the majority, therefore considered it “almost self evident that land councils are local government bodies” within certain Australian states.<sup>51</sup> As a result, he held that the case fell within the ratio of *Ballina* and the plaintiff could not bring a defamation action.

The dissenting judge, however, was persuaded by the facts that the Council was not elected by the public at large, did not represent the Crown, could have interests contrary to those of the Crown, and represented a minority group that the defendants did not belong to. Therefore, notwithstanding the fact that the Council was funded from general tax revenue, Meagher J.A. would have held that the Council *could* sue.

Two other Australian legal developments are worth noting. First, in *Theophanous v. Herald Weekly Times Ltd*<sup>52</sup> the High Court held that there is an implied constitutional freedom to publish on political matters. It is unclear what this means for the ability of governments to sue, but protecting speech about government matters now has a constitutional dimension in Australia.

46. *Ibid* at 150-153.

47. *New South Wales Aboriginal Land Council v Jones* (1998), 43 NSWLR 300 [Jones].

48. *Ibid* at 325.

49. *Ibid* at 330.

50. *Ibid*.

51. *Ibid* at 331.

52. *Theophanous v Herald Weekly Times Ltd*, [1994] HCA 46, 182 CLR 104.

Second, in 2006 Australian states changed their laws to prohibit trading corporations with more than ten employees from suing in defamation.<sup>53</sup> One of the arguments frequently made against a prohibition on defamation actions by municipalities and other public institutions is that municipalities are a kind of corporation that, by statute, has the rights and responsibilities of corporations. If corporations may sue in defamation, it is argued that so too may municipalities.<sup>54</sup> If, however, it is no longer generally the case that corporations may sue, the analogy to corporations does not assist government defamation plaintiffs.

#### 5. *Other common law countries*

The Indian Supreme Court has held that “the Government, local authority and other organs and institutions exercising power” are not entitled to sue in defamation.<sup>55</sup> Other countries have extended this prohibition to state-owned companies. The Zimbabwean Supreme Court threw out a claim by the Post and Telecommunications Company, following South Africa’s *Die Spoorbond* decision.<sup>56</sup> There are, however, limits to how far courts are willing to go. As noted above, the Hong Kong Court of Appeal has held that universities do not fall within the rule set out in *Derbyshire*.

#### 6. *Canada*

The Canadian law with regard to governments’ ability to sue in defamation has changed over time. Until the 19th century there was no reason to think that non-human entities, such as corporations and governments, could bring defamation actions at all. In 1858, the UK Court of Queen’s Bench of England and Wales held that corporations could.<sup>57</sup> Canada followed suit in 1915 in *Chicoutimi Pulp Co.*,<sup>58</sup> which clarified that corporations could bring defamation actions. However, the application of this rule to governments remained unclear.

53. *Civil Law (Wrongs) Act 2002 (ACT)*, s 121; *Defamation Act 2006 (NT)*, s 8; *Defamation Act 2005 (NSW)*, s 9; *Defamation Act 2005 (QL)*, s 9; *Defamation Act 2005 (SA)*, s 9; *Defamation Act 2005 (Tas)*, s 9; *Defamation Act 2005 (Victoria)*, s 9; *Defamation Act 2005 (WA)*, s 9 [Australia Defamation Acts].

54. See especially *Bognor*, *supra* note 25 but see also the argument considered, and rejected, in *Die Spoorbond*, *supra* note 6.

55. *R Rajagopal v State of TN* (1994), 6 SCC 632, 1995 AIR 264 (SC India).

56. *Post and Telecommunications Co v Modus Publications (Private) Ltd*, No SC 199/97 (Zimbabwe, SC).

57. John McLaren, “The Defamation Action and Municipal Politics” (1980) 29 UNBLJ 123 at 124-125, citing *Whitfield v South Eastern Railway Co* (1858), 120 ER 451 (QB).

58. *Price v Chicoutimi Pulp Co* (1915), 51 SCR 179.

In *Prince George v. British Columbia Television System Ltd.*,<sup>59</sup> which predated both the United Kingdom's *Derbyshire* case and the *Charter*, the British Columbia Supreme Court held that municipal governments *can* bring defamation actions against their citizens. The court considered the two pre-*Derbyshire* U.K. authorities (*Manchester* and *Bognor*) but noted that the matter of whether municipalities could bring libel actions was unresolved in Canadian law.<sup>60</sup> Yet whereas the House of Lords in *Derbyshire* was persuaded by *Chicago*, the British Columbia Supreme Court rejected the American cases because of the different constitutional contexts in Canada and the United States.<sup>61</sup>

Toy J.'s reasoning in *Prince George* was twofold. First, municipal corporations have reputations worthy of protection:

Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government corporation have a '*governing*' reputation which they are equally entitled to protect in the same way — of course, bearing in mind the vital distinction between defamation of the corporation as such and defamation of its individual officers or members. [*italics in original*]<sup>62</sup>

Second, there is no reason to treat municipal corporations differently than other corporations. They do not have any "unusual rights or immunities such as historically been the case with the provincial and federal governing bodies"<sup>63</sup> This suggests that the position of municipal corporations may have been different than that of the provincial and federal governments, although Toy J. did not elaborate.

The ratio in *Prince George* remained undisturbed until 2006 when two Ontario cases held it unconstitutional for municipalities to sue in defamation. A third case from British Columbia followed in 2009.

The reasons in *Montague Township v. Page*<sup>64</sup> and *Halton Hills (Town) v. Kerouac*<sup>65</sup> were released within a few months of each other. *Montague* was a decision on a motion for summary judgment. The defendant, who had criticized Montague Township, its councilors, reeve and fire service, argued that the defamation action brought against him

59. *Prince George v British Columbia Television System Ltd* (1978), 85 DLR (3d) 755 aff'd 95 DLR (3d) 577 [*Prince George*].

60. *Ibid* at para 4.

61. *Ibid* at para 5.

62. *Ibid* at para 7, citing *Bognor*, *supra* note 25 at 175.

63. *Ibid* at para 8.

64. *Montague*, *supra*, note 1.

65. *Halton Hills*, *supra*, note 1.

by the Township could not succeed because it was unconstitutional for municipalities to bring defamation actions against their citizens. The Canadian Civil Liberties Association obtained intervenor status and also argued that such an action unjustifiably infringes citizens' s. 2(b) *Charter* rights.

For its part, the plaintiff argued that any limits on s. 2(b) rights were justified because defamation defences such as fair comment and qualified privilege protect citizens' ability to criticize government. Justice Pedlar noted that there was no Ontario precedent on whether a government can sue a citizen in defamation<sup>66</sup> but held that such an action would be unconstitutional.<sup>67</sup> Although he did not do an explicit *Oakes* analysis, Pedlar J. held that the risks outweighed the benefits of such actions. He adopted the House of Lords' reasoning in *Derbyshire*, including the public importance in not punishing or chilling speech about governments and the mitigating fact of public officials' ability to bring their own defamation actions.<sup>68</sup> In addition, the Court relied on the inequality of resources between governments and citizens and the problematic use of public funds to finance such actions. Finally, the existence of the qualified privilege and fair comment defences was considered insufficient to justify permitting government defamation actions because of the onus of proof on defendants, such that a chilling effect would remain.<sup>69</sup>

Justice Pedlar therefore granted the defendant's motion for summary judgment. He effectively created a common law absolute privilege against government defamation actions<sup>70</sup> on the basis that if such actions were permitted, they would violate s. 2(b) of the *Charter*.<sup>71</sup>

The second post-*Charter* case is *Halton Hills*. Corbett J. stated that his reasoning did not rely on that in *Montague*, as he was finalizing his judgment when *Montague* was released.<sup>72</sup> *Halton Hills* involved an online news outlet that had alleged corruption against the plaintiff town. Like *Montague*, *Halton Hills* was a summary judgment motion argued, in part, on constitutional grounds. And like *Montague*, *Halton Hills* held it unconstitutional for a municipal corporation to bring a defamation action. Its reasoning, however, was different than that in *Montague*.

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66. *Montague*, *supra* note 1 at para 15.

67. *Ibid* at para 27.

68. *Ibid* at para 28.

69. *Ibid* at paras 28, 29, 31, 32.

70. *Ibid* at para 29, 32.

71. *Ibid* at para 32.

72. *Halton Hills*, *supra* note 1 at para 16.

Recall that *Montague* focused on the importance of democratic discourse about governments; the inequality of resources between government and citizens; the use of public funds to sue citizens; and the availability of actions to individuals affiliated with government. Corbett J. explicitly rejected the “use of public funds” argument:

I do not find it inimical to the basic principles of democracy that a government might sue an individual for some wrong allegedly done by that person. If (for example), a person damages public property, steals money from the state, or commits some other wrong and causes damage to the state, I see no reason why the state should not have recourse. To do so it will have to expend public resources. So it is not the expenditure of “public funds” to sue “a taxpayer” that is at issue. Rather, it is the restriction on freedom of speech—the rendering of certain statements made about the state actionable—that is the real mischief.<sup>73</sup>

In considering the importance of free speech, Corbett J. was more cautious than Pedlar J. The defendant in *Halton Hills* had argued that because speech about government is critical to democratic discourse, which is at the core of the *Charter*’s s. 2(b) protection, government defamation actions are unconstitutional. The defendant also relied on other jurisdictions’ prohibitions on government defamation actions.<sup>74</sup> Corbett J. was apparently concerned about a slippery slope. He rejected the defendant’s broad proposition, in part because the same argument could be made about defamation actions brought by public officials or by certain corporations (because speech about them is important to democratic discourse), but such actions, he implies, are permissible.<sup>75</sup> The broad argument could even apply to prevent governments from funding their employees’ defamation actions.<sup>76</sup> Corbett J. was clearly not prepared to go that far. Instead, he emphasized the unique nature of governments’ reputations given that governments are democratically elected bodies. He noted that governments have no *private* reputations, only public ones. As a result, they are different than individuals or non-government corporations.<sup>77</sup> Because governments are democratically elected, it is inherently problematic for the law to protect their reputations. Corbett J. cited with approval the following passage from *Ballina*:

to maintain that an elected governmental institution has a right to a reputation as a governing body is to argue for the existence of something

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73. *Ibid* at para 37.

74. *Ibid* at para 43.

75. *Ibid* at para 44.

76. *Ibid* at para 55.

77. *Ibid* at para 30.

that is incompatible with the very process to which the body owes its existence.<sup>78</sup>

He further stated: “The reason for the prohibition of defamation suits by government...lies in the nature of democracy itself. Governments are accountable to the people through the ballot box, and not to judges or juries...”<sup>79</sup> Because their reputations are wholly public, their reputations must be defended in the public arena.<sup>80</sup>

Given this emphasis, it may be that the prohibition on defamation actions, as envisioned by Corbett J., applies only to democratically elected government bodies (although this does not *necessarily* follow). The reasoning in *Montague*, on the other hand, could be interpreted to apply more broadly.

In terms of the legal basis for the prohibition, *Halton Hills* is consistent with *Montague*. Corbett J. states that the common law position “is that absolute privilege attaches to statements made about government.”<sup>81</sup> If governments could sue in defamation, which they (now) cannot at common law, this would be contrary to s. 2(b) of the *Charter* and not justifiable under s. 1 of the *Charter*. Corbett J. thereby implies that the *Charter* has altered Canadian values with regard to free speech such that a change in the common law from the *Prince George* position is warranted.<sup>82</sup>

The third post-*Charter* case addressing whether government institutions can sue in defamation is *Dixon v. Powell River (City)*.<sup>83</sup> It involved a municipality that had threatened to sue three citizens in defamation after they criticized the city’s plans for a local improvement project. The plaintiff was John Dixon, a civil liberties advocate and concerned citizen. Despite not being directly involved, he successfully claimed standing to challenge the city’s threats on the basis of his personal interest in receiving the citizens’ criticisms on matters of public interest.

Dixon sought declaratory relief under s. 24 of the *Charter* to the effect that the city could neither threaten to sue, nor actually sue its citizens in defamation. Garson J. granted the request for declaratory relief. Her order provided that the City of Powell River “lacks any legal basis or right to bring civil proceedings for defamation of its governing reputation.”<sup>84</sup> Although she cited both *Montague* and *Halton Hills*, Garson J.’s reasoning

78. *Ibid* at para 48, citing Gleeson CJ in *Ballina*, *supra* note 3 at 125-126.

79. *Ibid* at para 58.

80. *Ibid* at para 33.

81. *Ibid* at para 62.

82. *Ibid* at para 4.

83. *Dixon v Powell River (City of)*, 2009 BCSC 406; 94 BCLR (4th) 106 [*Dixon*].

84. *Ibid* at para 49.



appears to be based more in the democratic discourse arguments relied on in the former than on the nature of a government's reputation, relied on in the latter.<sup>85</sup>

The three post-*Charter* common law cases hold that municipalities cannot sue in defamation, but this seems not to be the case under Quebec's civil law. In *Rawdon v. Solo*,<sup>86</sup> the defendant argued that it was unconstitutional for the plaintiff municipality to bring a defamation action, and cited *Montague* and *Halton Hills*. The court rejected that argument, noting that under the *Civil Code*, municipalities have certain rights<sup>87</sup> and further noting that there is no separate tort of defamation in civil law. As with civil responsibility generally, the plaintiff must prove fault, unlike in common law defamation.<sup>88</sup> The Quebec Superior Court therefore held that the case should proceed on its merits to determine whether the defendant acted with fault in defaming the plaintiff.

*Montague*, *Halton Hills* and *Dixon* are the only post-*Charter* common law cases involving municipalities. There are, however, a number of cases involving other public institutions. In *Wilson v. Switlo*,<sup>89</sup> the British Columbia Supreme Court followed *Dixon* in holding that a band council created under the *Indian Act* could not sue in defamation. Punnett J. cited the Quebec Court of Appeal for the proposition that band councils have similar legislative powers to municipal corporations.<sup>90</sup> For that reason, he held that:

it would be inconsistent with the role of the [Kitimaat Village Council], a body that is elected democratically and exercises power through the *Indian Act*, to have the capacity to maintain an action for defamation.<sup>91</sup>

Another case involving a band council is *Horse Lake First Nation v. Horseman*,<sup>92</sup> which predated *Montague*, *Halton Hills*, *Dixon* and *Wilson*. Although the facts are somewhat unclear, the case involves defamation and trespass actions by the First Nation against some of its members in protesting the Horse Lake First Nation leadership. The defendants asserted s. 2(b) *Charter* rights, and the Court held, as a preliminary matter, that

85. I draw this conclusion from the fact that Garson J cited the importance of free speech where criticism of government is concerned, and did not mention the nature of a government's reputation. See *ibid* at paras 46, 47.

86. *Rawdon (Municipalité de) c. Solo*, 2008 QCCS 4573, JE 2008-2099 [*Rawdon*].

87. *Ibid* at paras 22-36.

88. *Ibid* at para 33.

89. *Wilson v. Switlo*, 2011 BCSC 1287; 207 ACWS (3d) 366 [*Wilson*].

90. *Ibid* at para 128.

91. *Ibid* at para 130.

92. *Horse Lake First Nation v. Horseman*, 2003 ABQB 152; 17 Alta LR (4th) 93 [*Horse Lake*].

the *Charter* applied to the First Nation in this case because it exercises statutory authority delegated by government in the *Indian Act*.<sup>93</sup> The logical next step would have been an action alleging that the trespass and defamation actions breached the protesting band members' s. 2(b) *Charter* rights, but there is no reported decision on point.

In *Kenora (Town) Police Services Board v. Savino*,<sup>94</sup> the Kenora Police Services Board and individual police officers brought a defamation action against a lawyer who had alleged racism in the police force. The defendant argued that the defamation action infringed his *Charter* rights. The Court held that, notwithstanding their position of authority, the police officers were private litigants to whom the *Charter* did not apply.<sup>95</sup> It cited the Ontario Court of Appeal in *Hill v. Church of Scientology* for the proposition that:

[t]he *Charter* is not applicable to a libel action by an employee of the government because in pursuing the case, the employee was acting as a private individual whose personal reputation was at issue, which did not constitute litigation involving legislative or governmental action.<sup>96</sup>

As a result, the *Charter*-based argument failed in relation to the individual officers. However, the Court noted that the Police Services Board could not rely on the same argument. Although Kinsman J. seemed skeptical that the Board was government for the purposes of a *Charter* challenge to the Board's defamation action, he held that it was not plain and obvious that the defendant's counterclaim disclosed no reasonable cause of action against the Board.<sup>97</sup> It does not appear that the counterclaim was ever adjudicated on its merits.

Other defamation actions brought by public authorities are less illuminating. In *Windsor (City) Roman Catholic Separate School Board v Southam Inc.*,<sup>98</sup> a case from 1984, the school board alleged that an article in the Windsor Star had libeled it. One issue was the School Board's ability to sue in defamation. However, nothing in the reasons turned on the Board's status as a public authority. Instead, the objections to the claim were twofold: first, that the powers conferred on the Board by statute did not include the right to bring a defamation action. Second, it was argued

93. *Ibid* at paras 11-19.

94. *Kenora (Town) Police Services Board v Savino*, [1995] OJ No 4314 [Kenora].

95. *Ibid* at para 17.

96. *Ibid* at para 18, citing *Hill v Church of Scientology of Toronto*, [1994] OJ No 961, 18 OR (3d) 385 with approval.

97. *Ibid* at paras 26, 27.

98. *Windsor (City) Roman Catholic Separate School Board v Southam Inc.*, [1984] OJ No 3193, 46 OR (2d) 231 [Windsor].

that as a corporation, the Board had no reputation to protect. Dupont J. rejected both of these arguments, and held that the Board was entitled to bring an action.

In *Regina School Division No 4 of Saskatchewan v. Hall*,<sup>99</sup> and *Ottawa-Carleton District School Board v. Scharf*,<sup>100</sup> there is no indication that the school boards' ability to sue was raised.

In *Saint John (City) Employees Pension Plan v. Ferguson*, the Board of Trustees of the City of Saint John Employees Pension Plan sued a city Councilor<sup>101</sup> in defamation. The action was ultimately defeated due to the Councilor's qualified privilege, but one of the many motions in the dispute related to the Board's ability to sue. As with *Windsor*, however, the challenge was based on the Board's alleged lack of legal personality and reputation. The issue of limits on public authorities' rights to sue in defamation appears not to have been raised. The Court held that the Board had both legal personality and a reputation and therefore had standing to bring the action.

*York University v. Bell Canada Enterprises*<sup>102</sup> is another case in which the issue of the ability to bring a defamation action was not raised. I mention it simply to show that a variety of public (or quasi-public) institutions are, in fact, bringing defamation actions.

To summarize, no Canadian appellate court has addressed the issue of a government's right to sue in defamation. That said, in the *Charter* era, lower courts have been unanimous in holding that municipalities cannot bring defamation actions. Further, given the trend in Canada toward modifying defamation law to make it more consonant with *Charter* values,<sup>103</sup> and the fact that all other common law jurisdictions canvassed prohibit government defamation actions, it seems unlikely that a Canadian appellate court would hold that governments, including municipalities, can bring defamation actions.

Although this conclusion seems unassailable, the reasoning for the conclusion varies from case to case. *Montague* and *Dixon* rely most heavily

99. *Regina School Division No 4 of Saskatchewan v. Hall*, 2009 SKCA 118, 343 Sask R 268 [*Hall*].

100. *Ottawa-Carleton District School Board v. Scharf*, [2007] OJ No 3030, aff'd 2008 ONCA 154, 164 ACWS (3d) 368.

101. *Saint John (City) Employee Pension Plan v. Ferguson*, 2012 NBQB 46, 387 NBR (2d) 118 [*Ferguson*]. In fact, one of the trustees deposed that the Board is "not a governmental entity." The Board is established by the *City of Saint John Pension Act* and is funded by government, but its members are not elected by the public, the Board does not take direction from the City and its role is to ensure the proper funding of the City employees' pension fund (*ibid* at para 9).

102. *York University v. Bell Canada Enterprises*, [2009] OJ No 3689, 99 OR (3d) 695.

103. See e.g. *Grant v. Torstar Corp.*, 2009 SCC 61, 3 SCR 640 [*Grant*]; *WIC Radio Ltd v. Simpson*, 2008 SCC 40, 2 SCR 420; and *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, 3 SCR 269.

on the importance of democratic discourse, while *Halton Hills* emphasizes the public nature of governmental reputation and recognizes the potential slippery slope in a rule against government defamation actions grounded predominantly in the importance of speech about governments.

There is uncertainty with regard to whether all statements about a municipality are protected, or whether the statement must relate to the city's "governing reputation." In *Horse Lake*, the court found that it would be unconstitutional for the Band Council to sue in defamation in the circumstances of the case but implied that it might not be unconstitutional for a band council to sue in defamation in relation to purely commercial matters.<sup>104</sup> Whether some or all statements about government should be protected depends in large part on why one thinks governments should not be allowed to sue in defamation. If it is because the nature of a government's reputation is such that it shouldn't be protected by the courts (as in *Halton Hills*), then an absolute privilege for a wide range of speech about governments would presumably be justifiable. However, if it is because of the importance of democratic discourse (as in *Montague*), then a narrower privilege applicable only to speech about governmental matters might more easily be justified.

A further area of uncertainty is the application of the prohibition on defamation actions to public institutions other than governments. As noted in *Halton Hills*, "while the case may be clear for democratically elected governments, it is not clear that the principle [that governments are not allowed to sue in defamation] applies with equal force to all public bodies."<sup>105</sup> In one case, band councils under the *Indian Act* have been analogized to municipalities and prohibited from bringing a defamation action. Whether the prohibition applies to other public institutions in Canada is unresolved.

The prohibition will surely be found to apply to at least some other public bodies. This is especially likely for democratically elected bodies like school boards, because all the rationales raised in the case law apply to them (it is important to promote discourse about them, they have public reputations that should be judged in the political arena rather than in courts).

One factor that may help determine the scope of the rule is whether the rule is viewed predominantly as grounded in the *Charter* or in the

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104. *Horse Lake*, *supra* note 92 at para 30: "There are circumstances where the decisions of the Band should not be subject to the *Charter*. For example, if the Band or Band Council is contracting with a private party for goods or services, the relationship is one that would likely be governed by private contract law."

105. *Halton Hills*, *supra* note 1 at para 50.

common law. Must courts determine whether the plaintiff is government for *Charter* purposes or is it enough to say that it is a public institution for the purposes of a common law absolute privilege? Is an analysis based on section 1 of the *Charter* required? In *Kenora*, the Court considered whether the Kenora Police Services Board was government for the purposes of *Charter* application. The Court doubted whether it was,<sup>106</sup> yet if we ignore the *Charter* application issue and instead focus on the rationales in cases such as *Montague* and *Halton Hills*, it is at least arguable that police boards are sufficiently governmental to be denied the right to sue in defamation. Further, in other jurisdictions the prohibition has sometimes been applied to institutions that, in Canada, would presumably not be government for *Charter* application purposes, such as political parties.<sup>107</sup>

II. *A normative proposal: deny standing to sue in defamation to a broad range of public institutions, such as those that are subject to access to information requests*

1. *Introducing the prohibition*

The first section of this article was descriptive. The second explores the extent to which the prohibition on government defamation actions *should* apply to public institutions other than federal, provincial or municipal governments. In other words, it addresses the proper scope of the prohibition. In so doing, it explores questions such as why a total ban is justified and why public institutions should be treated differently than private ones.

Terms such as “public institution,” “public authority,” and “government institution” are used interchangeably. The aim is not to define these terms, but rather to determine which public institutions should be prohibited from suing in defamation. The terms are therefore used broadly, to include entities controlled, in part or in whole, by governments, and institutions whose mandates are public in part or in whole. They could also refer to certain individuals, such as office holders, although ultimately human beings are excluded from the scope of the proposed rule. These terms therefore include not only democratically elected school boards, but also Crown corporations and universities. A rule is then proposed that applies to a subset of such institutions.

The analysis begins with the assumption, given the discussion in section 1, that it is right to deny some public authorities the ability to sue

106. *Kenora*, *supra* note 94 at paras 26-27.

107. *Goldsmith*, *supra* note 33. The Ontario Superior Court held in *McKinney v Liberal Party of Canada et al*, 1987 CanLII 4138 (ON SC) that the *Charter* does not apply to political parties.

in defamation, and ends with a proposed test that will help provide greater certainty to litigants. That test is to deny standing to sue in defamation to all institutions governed by access to information legislation,<sup>108</sup> including the federal, provincial and municipal governments. Although there is some variation from jurisdiction to jurisdiction this would tend to include school boards, hospitals, human rights commissions, police services, universities and Crown corporations.

The rule would apply to all entities subject to access to information requests, but not necessarily *only* to such entities. In addition, political parties and perhaps other institutions could be prohibited from bringing defamation actions, as considered appropriate by courts or legislators. With regard to political parties in particular, although not subject to access to information legislation, their *raison d'être* is political and they often wield significant influence over government. It could therefore be argued that Canada should follow the United Kingdom<sup>109</sup> in prohibiting defamation actions brought by political parties, although that argument is not developed further here.

The principles underlying the proposed prohibition are by and large the same ones relied on in Canadian case law (nature of a government's reputation etc.) and adopting the proposed prohibition could therefore be considered an incremental change in the law, within the competence of the common law courts. Ideally, however, the rule would be legislated—perhaps through an amendment to provincial defamation statutes. Although such a legislative change seems unrealistic at present, other common law countries have recently undertaken significant legislative reforms of their defamation laws<sup>110</sup> and the Law Commission of Ontario has recently begun a defamation law reform exercise.<sup>111</sup>

The rest of this introductory section summarizes the reasoning behind the proposal. Subsequent sections set out the rationale in detail. To summarize, although a prohibition on defamation actions depends on the public interest in speech about governments, the public interest in the communication cannot be the sole or even primary basis for such

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108. These are sometimes also known as Freedom of Information laws. See e.g. *Access to Information Act*, RSC 1985, c A-1; *Access to Information and Protection of Privacy Act*, SNL 2002, c A-1.1; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31.

109. *Goldsmith*, *supra* note 33.

110. See Australia Defamation Acts, *supra* note 53 and the *Defamation Act 2013* (UK), c 26 [UK *Defamation Act*].

111. Patricia Hughes, "Getting Involved 1: Defamation in the Age of the Internet" (21 October 2014), Law Commission of Ontario, online: <[www.lco-cdo.org](http://www.lco-cdo.org)>.

a prohibition. Otherwise we would be justified in banning defamation actions by politicians, CEOs, corporations and many others.

An essential distinction is that between human and non-human plaintiffs, since defamation implicates such different reputational interests for humans and non-humans. Thus, defamation law can legitimately treat corporations differently than CEOs and public institutions differently than politicians. Another important distinction is that between public and private institutions. They differ both in the nature of their reputations and in their relationships with the citizenry, such that defamation law should apply differently to them. In particular, given that authority to govern is grounded in public support, there is an inherent danger in allowing public institutions to use the state-backed legal system to enforce a right to be well thought of.

Those institutions subject to access to information law should be denied standing to sue in defamation because in addition to being non-human public entities, the legislatures have identified them as institutions about which disclosure of information is important in holding government accountable. Finally, a complete prohibition is justified rather than simply relying on defences. Defamation defences that seek to protect speech on matters of public interest impose too great an onus on defendants and are insufficient to prevent a chilling effect on speech.

## 2. *It's not only about speech on matters of public interest*

A prohibition on government defamation actions would be untenable if its sole, or even predominant, justification were the public interest that people have in unfettered communication about their public institutions. No one doubts that such communication is important. Little needs to be said under this heading, as people have written for centuries about the vital importance in a democracy of the freedom to speak about governments and their institutions. The importance of democratic discourse is one of the rationales underlying the *Charter's* section 2(b) guarantee of freedom of expression: "government by the free public opinion of an open society... demands the condition of a virtually unobstructed access to and diffusion of ideas."<sup>112</sup>

That said, many things are matters of public interest. It is also vital that people be able to speak out about the prime minister or a corporation that is polluting a river. One might therefore question, as Mahoney J.A. did in *Ballina* and as Corbett J. did in *Halton Hills*, whether there is any principled reason to distinguish between civil servants and public authorities when it

112. *Grant*, *supra* note 103 at para 48 citing *Switzman v Elbling*, [1957] SCR 285 at 306.

comes to prohibiting defamation actions. If the focus is primarily on the public interest in such speech, no principled distinction is possible.

A public interest is perhaps necessary, but not sufficient to justify denying governments and public institutions standing to sue in defamation.

### 3. *It's also about being an institution*

The argument that public institutions may be treated differently than humans whose actions are of public interest relies in large part on the different reputational interests that human beings and institutions possess. Reputation has to do with how others think about us: it is therefore relational.<sup>113</sup> To answer the question of how defamation law should protect reputation we must consider why it matters what others think of us. There are different answers to this question. Robert Post famously categorized reputation, for the purposes of defamation law, as implicating interests in property, dignity and honour.<sup>114</sup> David Rolph has added to this the concept of reputation as celebrity.<sup>115</sup> Each of these conceptualizations of reputation is open to criticism, but Post's is helpful in assessing why it might matter what people think about their public institutions.

One reason why it matters what people think of us is that there are professional and economic consequences of reputation. This is what Post refers to as "reputation as property," which is akin to goodwill.<sup>116</sup> It is a kind of intangible property that may be possessed by human beings or institutions. It may result from the exertion of labour and it presupposes market-based relationships between parties since reputation as property is valued in the marketplace. Public institutions, like corporations and human beings, undeniably possess reputation as property. If a public institution's reputation is diminished, it may not be able to borrow money at favourable rates or to hire qualified staff for the same salary that it once could. This is, of course, a loss to it—one in the nature of property. A municipality's reputation as property is what the courts in *Prince George* and *Bognor* sought to protect.

Another of Post's categories of reputation is reputation as honour, which refers to the esteem in which someone is held by virtue of their position in society. The normative characteristics of a social role are

113. See e.g. Robert Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74:3 Cal L Rev 691 at 692.

114. *Ibid.*

115. Reputation as celebrity refers to reputations as formed by audiences based on media representations of an individual. See David Rolph, *Reputation, Celebrity and Defamation Law* (Aldershot, UK: Ashgate, 2008) [Rolph, "Reputation"] at 178-184.

116. Post, *supra* note 113 at 693.



imputed to those who fill that role, independently of any effort of desert.<sup>117</sup> It is therefore hierarchical rather than egalitarian. Post gives the examples of kings and members of the military.<sup>118</sup>

Institutions, like people, may have reputation as honour. Post cites the existence of seditious libel as an example of the law protecting the reputation as honour of the government and its officials.<sup>119</sup> I say nothing more about reputation as honour because defamation law should not protect reputation as honour in the 21st century.<sup>120</sup>

A third reason why it matters what people think of us is that human beings are social creatures with dignity. When people think less of us, our sense of self-worth is affected. We may suffer emotionally as a result, but even apart from such suffering, we have been injured because our membership in society has been affected, just as we can be said to be injured by an invasion of privacy or by a trespass to the person even if we do not suffer emotionally because of it.

The dignity interest in reputation is described differently by different courts and scholars, but two things are clear: first, common law courts are emphasizing the importance of the dignitary aspect of reputation, and second, only human beings have a dignitary interest in reputation.

Courts have frequently cited the dignitary interest in reputation when justifying defamation's protection of reputation. They describe it as a human right similar to the right to privacy or family life. For example, in *Rosenblatt v. Baer*, Stewart J. of the United States Supreme Court considered the basis for the right to reputation to be: "the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."<sup>121</sup> Similarly, the Supreme Court of Canada in *Hill v. Church of Scientology* stated that: "the good reputation of the individual...underlies all *Charter* rights" and "represents and reflects the innate dignity of the individual."<sup>122</sup> "The publication of defamatory comments constitutes an invasion of the individual's personal privacy

117. *Ibid* at 699-700.

118. *Ibid* at 700, 707.

119. *Ibid* at 723.

120. Since reputation as honour inheres in a social role, regardless of behaviour or merit, protecting reputation as honour is inappropriate in modern egalitarian societies that promote equality, democracy and the rule of law. Reputation based on immutable social roles persists, but neither individuals nor institutions should be able to insist that the law protect that reputational interest. Post, *ibid* at 722 ("the concept [of honor] is inconsistent with the egalitarian principles of American democracy").

121. *Rosenblatt v. Baer*, 383 US 75 (1966) at 92, 679. This was dictum but was endorsed by a majority of the US Supreme Court in subsequent cases, see e.g. *Gertz*, *supra* note 17.

122. *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, [1995] SCJ No 64 [*Hill*] at para 123.

and is an affront to that person's dignity."<sup>123</sup> In *Éditions Écosociété Inc. v. Banro Corp.* the Supreme Court of Canada characterised Hill as having elevated the protection of individuals' reputation "to quasi-constitutional status."<sup>124</sup>

On the second point, scholars agree that only human beings can have an interest in reputation as dignity. For example, Post notes that corporate defamation actions only make sense in the context of reputation as property, not reputation as dignity, because they are not human beings.<sup>125</sup> This lack of an interest in reputation as dignity has also been cited as a reason for either denying corporations the right to sue in defamation (as in Australia),<sup>126</sup> or as a reason for applying different defamation rules to corporations (as in the United Kingdom).<sup>127</sup> Certainly, Post suggests that different kinds of reputational interests should be protected differently.<sup>128</sup>

These points lead to the conclusion that reputation as dignity is central to modern defamation law, and it is not an interest that governments or public institutions can have in their reputations. When considering why it matters what people think about governments or public institutions, we need not consider any dignitary interest, in the sense of a personal interest in preserving dignity and self-worth. There is therefore good reason for

123. *Ibid* at para 124.

124. *Éditions Écosociété Inc v Banro Corp*, 2012 SCC 18, [2012] SCR 636 at para 57, [2012] 1 SCR 636, citing *Hill*, *supra* note 120 at paras 120-121.

125. Post, *supra* note 113 at 696. See also Rolph, "Reputation," *supra* note 115 at 98; Gary Chan, "Corporate Defamation: Reputation, Rights and Remedies" (2013) 33:2 LS 264 at 268.

126. See Aust, NSW, Attorney General's Taskforce on Defamation Law Reform, *Defamation Law: Proposals for Reform in NSW* at 13, online: <www.lawlink.nsw.gov.au> [AG Report], which refers to Post's distinctions between different kinds of reputation. In submissions to the legislature, the New South Wales Attorney General stated:

The submissions received by the State and Territory Attorneys General on this issue overwhelmingly supported a complete ban on corporations suing, or allowing only non-profit organisations to sue. The simple fact is that corporations are not people, and they do not have personal reputations to protect—their interest is purely commercial.

Aust, NSW, Legislative Council Hansard (18 October 2005) at 18683, online: <www.parliament.nsw.gov.au>. For scholars' views, see David Rolph, "A Critique of the National, Uniform Defamation Laws" (2008) 16:3 Torts LJ 207 at 217 and Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46:2 UBC L Rev 529 [Young, "Rethinking"].

127. For example, in committee discussions about the draft United Kingdom Defamation Act, one recommendation, ultimately adopted in the UK *Defamation Act*, *supra* note 110 at s 1(2), was to require corporations to demonstrate financial loss in order to succeed in a defamation action. One reason for this recommendation was that "[c]orporate claimants have neither personal emotions nor dignity." See UK, HC & HL, "Legislative Scrutiny: Defamation Bill —Human Rights Joint Committee Contents," online: <www.publications.parliament.uk>.

128. Post, *supra* note 113 at 721 ("By acknowledging the differences between reputation as property and reputation as dignity, defamation law could begin the task of devising distinct doctrinal structures appropriate to each form of reputation"). See also Young, "Rethinking," *supra* note 126, which argues for the differential treatment of corporations in defamation law. Specifically, they should be denied the right to sue.

the law to treat human beings' and institutions' reputations differently. It follows that a public figure doctrine,<sup>129</sup> or similar test that would apply equally to human and non-human plaintiffs, should be rejected.

For this reason, one could argue that it is justifiable to deny *all* non-human plaintiffs access to defamation law: instead they should have to rely on laws (existing or new) that reflect that proprietary nature of the injury. Such laws would, for example, likely require proof of injury and perhaps of fault—neither of which defamation law requires. No jurisdiction has yet gone this far, and this article does not advocate such a position. It is nevertheless an important starting point that because non-human entities lack a dignitary interest in reputation, they have a diminished claim to the extra protection of reputation that defamation law provides over property-based legal protections for reputation, such as the law of injurious falsehood.

#### 4. *It matters that the institution is public*

To this point the article has provided justification for a rule that treats human and non-human plaintiffs differently, but not for a rule that treats public institutions differently than corporations or unions.

Many of the arguments against corporate defamation actions would apply equally to deny all non-human plaintiffs, including governments, standing to sue in defamation. However, even if those arguments are not persuasive, there are additional reasons to deny standing to public institutions specifically. This is not because speech about public institutions is of greater public interest than speech about private ones. It has already been suggested that this is not inherently true. Nor does the distinction lie in the fact that public institutions in some sense belong to us and we should therefore be allowed to defame them. Communal ownership of public institutions does not entitle us to injure them, just as we do not excuse vandalism of government buildings on the theory that the vandal was destroying his own property.

Rather, the justification for applying defamation law differently to public and private institutions is the nature of public institutions: the fact that their existence and power depend on public support—that is, on their reputations. Because of this, public institutions should not be allowed to

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129. In the United States, defamation claims by public figures require the plaintiff to establish actual malice (see *Sullivan*, *supra* note 17; *Gertz*, *supra* note 17). Bob Tarantino has suggested that Canada adopt a public figure doctrine in its defamation law. Bob Tarantino, "Chasing Reputation: The Argument for Differential Treatment of 'Public Figures' in Canadian Defamation Law" (2010) 48 Osgoode Hall LJ 595.

use the civil justice system to try to rehabilitate their reputations or to punish criticism.

Consider the nature of governments' and public institutions' reputations. This subject is underexplored in the academic literature.<sup>130</sup> In cases such as *Prince George*, a government's reputation was analogized to that of a corporation.<sup>131</sup> Corporations can suffer losses as a result of diminished reputations and so too can governments. They therefore have valuable reputations worth protecting. For example, as was argued in *City of Chicago*, the city's ability to borrow money at low interest rates might be affected by defamation.<sup>132</sup> So too might its ability to hire qualified staff.

In contrast, other courts have held it nonsensical to speak of governments having a private reputation that defamation law would protect. Gleeson C.J. took this approach in *Ballina*:

to maintain that an elected governmental institution has a right to a reputation as a governing body is to argue for the existence of something that is incompatible with the very process to which the body owes its existence.<sup>133</sup>

Similarly, Corbett J. stated in *Halton Hills* that governments have no *private* reputations, only public ones.<sup>134</sup>

It is not contradictory to say that a government has an interest in reputation as property and to say that protecting a government's reputation is inconsistent with democratic process. Although courts often treat reputation as though it were a clear and unified concept, as demonstrated above, it is neither. Post set out three reputational interests that defamation law implicates: property, honour and dignity. But public institutions have an additional and important interest in their reputations. It is referred to here as "reputation as governing power." This is the relationship between what people think about a public institution and its ability to achieve its public goals. It shares features of reputation as property, but is not market-

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130. There is public international law and diplomacy scholarship on the importance of a *state's* reputation and how that affects states' willingness to obey international law. See e.g. Rachel Brewster, "Unpacking the State's Reputation" (2009) 50:2 Harv Intl LJ 231 and Jian Wang, "Managing National Reputation and International Relations in the Global Era: Public Diplomacy Revisited" (2006) 32:2 Public Relations Rev 91. There is also scholarship on governments' reputation in the context of marketing and branding. See e.g. Vilma Luoma-aho, "Sector Reputation and Public Organizations" (2008) 21:5 Intl J Public Sector Management 446. This scholarship is not especially helpful in assessing the nature of a government's reputation for defamation purposes.

131. *Prince George*, *supra* note 59 at para 7.

132. *Chicago*, *supra* note 10 at 86.

133. *Ballina*, *supra* note 3 at 125-126. See also *Halton Hills*, *supra* note 1 at para 48.

134. *Halton Hills*, *ibid* at para 30.

driven. It is therefore distinct from the power that comes from having money.

If the police have a reputation for racism and abuses of power, they may face civil disobedience or other kinds of resistance that make it harder for them to carry out their objectives. If a city is thought to be corrupt, it may not be able to garner enough support to pass or enforce bylaws. Ultimately, a government may not be re-elected or an institution may be eliminated. Consider the Canadian Senate: its reputation is so poor that its survival was recently in doubt despite the fact that abolishing it would require a constitutional amendment. An injury to reputation as governing power can prevent public institutions from achieving their goals.

This interest is in some ways similar to reputation as dignity in that when people think less of an individual, that individual is less able to persuade others to help her achieve her own ends. However, the inability to achieve those ends has implications for the individual's self-worth, suffering, and her ability to pursue a life that she considers to have value. Those effects are all associated with human emotions and endeavours. However, injuries to reputation as governing power have a very different effect on institutions than injuries to reputation as dignity have on people.

Although reputation as governing power is an important and valuable interest, it is not one that should be protected by the law of defamation. This is because of the very nature of the relationship between governments and citizens.

Gleeson C.J. may have had something like reputation as governing power in mind when, in *Ballina*, he referred to the incompatibility between a governing body's right to reputation and the democratic process.<sup>135</sup> Any disputes between government and citizens about a government's performance must be resolved by *convincing* the public through speech and actions.

There are both principled and practical reasons for this: in terms of principle, the nature of democracy is that the entitlement to govern derives from public support and has no other basis. Public support need not be informed or correct or fair in order to be legitimate. We do not deny citizens the right to cast a vote, or to demonstrate peacefully in the streets, because they have their facts wrong. Democracy requires that people be able to form their own opinions and understanding of facts, even if wrong, and rely on them in participating in democratic processes. A government's legal right to a good reputation would be incompatible with this fundamental aspect of the relationship between citizens and

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135. *Ballina*, *supra*, note 3 at 125-126.

governments. Just as a government cannot challenge a vote on the basis that the voter was misinformed, it should not be entitled to a civil remedy on the basis that false information prevents it from achieving its goals.

The practical reasons for not allowing governments and public institutions access to defamation law relate to the serious consequences of them using the courts to punish critics. If it is *prima facie* tortious to say anything that would make a reasonable person think less of a government (causing a reasonable person to think less of the plaintiff being the test of defamation), then the government can stifle dissent by suing those who speak out against them. This has the effect not only of punishing and perhaps silencing specific critics, but also of chilling speech critical of government in general. Where governments can stifle dissent, democracy is at risk.

Of course whenever a powerful plaintiff sues critics there is the possibility of a chilling effect with negative consequences. This is much discussed in the literature on corporate defamation claims and SLAPP suits, for example.<sup>136</sup> The difference, however, is that governments get to make the law. And because they need public support to stay in power, the ability to use the law to stifle dissent has particular consequences for democracy.

But what of a public institution's reputation as property? If, as Post suggests, the law could protect different reputational interests differently, why not let defamation law protect a government's reputation as property but not its reputation as governing power? After all, we all have an interest in ensuring that false information does not prevent our public institutions from achieving their commercial goals. Why not, as was raised, though not resolved, in *Ballina*,<sup>137</sup> distinguish between criticisms that relate to governmental and administrative functions and those that do not?

The main reason to deny public institutions standing to sue in defamation, even with regard to criticisms of their non-governmental functions, is that it is impossible to distinguish between an institution's public and private affairs. What seems like a private matter (e.g., staff hiring, investing assets) always has some public relevance. "Because of [a municipality's] proprietary rights it does not lose its governmental character...[N]o distinction can be made with respect to the proprietary and governmental capacities of a city."<sup>138</sup>

136. See e.g. Young, "Rethinking," *supra* note 126 at 559-563; Susan Lott, "Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada" (2004), online: PIAC <[www.piac.ca](http://www.piac.ca)>.

137. *Ballina*, *supra* note 3 at 119.

138. *Chicago*, *supra* note 10 at 91.

This section has focused on reasons why it is problematic for governments and public institutions to be able to sue in defamation. But of course, public institutions vary in the extent to which their goals are public and the extent to which they are answerable to the public. The democratic consequences discussed above are therefore presumably more a concern in relation to a provincial government than to a university. While this is true, the fact that public institutions are all non-human entities, combined with their public nature (in varying degrees), goes a long way toward supporting a broad rule denying public institutions a right to sue in defamation. The next section elaborates on which public institutions should be denied standing to sue in defamation and why.

##### 5. *Institutions subject to access to information requests*

If a broad rule prohibiting public body defamation actions is desirable, then all that remains is to determine its scope. There is no entirely satisfactory answer to this problem: what counts as a public institution is, as we shall see, difficult to determine. It is suggested below that access to information legislation could provide a bright line test for which institutions may sue in defamation and which may not. Although this approach is not unproblematic, it is hoped that the proposal will generate further discussion.

The reason why access to information legislation could help determine the scope of the rule is that institutions subject to such laws share two features: they are in some sense public and they are institutions about which the government thinks citizens should be entitled to information because it is relevant to government accountability. In fact, public access to information about these bodies is considered sufficiently important to justify the allocation of significant public resources to support the right of access.

This is not, of course, to suggest that there is anything in access to information laws that requires public institutions to be denied access to defamation law. Rather, the point is that there is a significant overlap between institutions subject to access to information law and those about which free communication of information is important to holding governments accountable.

One might object that there is a big difference between access to government records and the right to spread lies about a public institution. Information in the possession of government institutions may be important regardless of its truth. For example, if an institution is basing policy decisions on false records in its possession, that is important for the public to know. Defamatory statements that are false or malicious do not,

it could be argued, have such value. It is therefore unconvincing to draw a connection between access to information and denying protection to a public institution's reputation.

But it is not true that false statements about public institutions always lack value in terms of democratic discourse. The Supreme Court in *Grant* held that there was value in even false speech on matters of public interest: "the first two rationales for free expression squarely apply to communications on matters of public interest, even those which contain false imputations."<sup>139</sup> More importantly, the Court also stated that: "[t]he law acknowledges through recognition of privileged occasions that false and defamatory expression may sometimes contribute to desirable social ends."<sup>140</sup> Setting the right balance between free speech and reputation means acknowledging the chilling effect the law has on valuable speech. To avoid that chilling effect, it may be justifiable to create rules that sometimes allow defamatory speech to go unremedied—just as the defences of absolute and qualified privilege do.

There are admittedly problems with an approach grounded in access to information law. The most serious is that there is no clear principle underlying the decision to include or exclude an organization from access to information laws. Typically, organizations are subject to those laws for one of two reasons: either because the organization fulfills a function that was traditionally carried out by government, or because it shares an organizational feature of, or is regulated by, government.<sup>141</sup> Yet there is no consensus on the types of organizations to which access to information law should apply. Alasdair Roberts discusses the various ways in which access to information laws in various jurisdictions treat crown corporations, quasi-governmental organizations and contractors, for example.<sup>142</sup> Rejecting approaches based on tradition and connection to government, Roberts argues for one based on the negative effects of denying access.<sup>143</sup> That is, institutions should be subject to access to information laws if denying such access would be sufficiently harmful. The fact remains, however, that the criteria for inclusion in Canadian access to information laws are unclear.

A second problem with the access to information approach is that governments decide which institutions are subject to the law and there are incentives to keep that list as short as possible. There has lately been much

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139. *Grant*, *supra* note 103 at para 52.

140. *Ibid* at para 30.

141. Alasdair Roberts, "Structural Pluralism and the Right to Information" (2001) 51:3 UTLJ 243 at 254.

142. *Ibid* at 245-251.

143. *Ibid* at 256.



criticism of the need to reform access to information laws to reflect the fact that government work is increasingly being contracted out to private organizations. “Many public functions now are undertaken by entities that do not conform to standards of transparency imposed on core government ministries.”<sup>144</sup> For example, Stanley Tromp has argued that organizations such as the Canada Pension Investment Board and Canada Blood Services should be subject to access to information law.<sup>145</sup> It seems that the list of entities subject to such laws is, and is likely to remain, underinclusive.

Although problematic, the proposed access to information approach is preferable to certain alternatives, such as denying standing based on whether an institution is elected, or based on government control, using a test similar to that found in the law of *Charter* application.<sup>146</sup>

The “democratically elected” approach, as seen in *Jones*,<sup>147</sup> can be difficult to apply. In that case, two judges considered it sufficient that the New South Wales Aboriginal Land Council was elected by a segment of the population, whereas the dissenting judge considered it relevant that the defendant was not a member of the constituency that elected the body. In the United Kingdom’s *Goldsmith*<sup>148</sup> case, “democratically elected” was extended to include political parties.

More importantly, a “democratically elected” test would exclude many institutions of a largely public nature from the prohibition. It would catch some school boards but presumably not police services boards or other institutions to whom public functions have been delegated. As noted by Baroness Hale in *Jameel*: “[t]hese days, the dividing line between governmental and non-governmental organisations is increasingly difficult to draw.”<sup>149</sup> In an era where much public work is delegated to private or quasi-private institutions, there is significant public interest in such institutions, even if they are not elected bodies.

A “government control” test should also be rejected. An institution may be delegated significant power and be given public funds but may not be controlled by government. Information about such institutions is important to government accountability. In addition, such a test is uncertain (how much control? what kind of control?). Of course, uncertainty in the law is not inherently problematic, but we can do better: the value of a

144. *Ibid* at 244.

145. Stanley Tromp, *Fallen Behind: Canada’s Access to Information Act in the World Context* (2008) [unpublished], online: <[www3.telus.net/index100/report](http://www3.telus.net/index100/report)> at 81.

146. *McKinney v University of Guelph*, [1990] 3 SCR 229, [1990] SCJ No 122.

147. *Jones*, *supra* note 47.

148. *Goldsmith*, *supra* note 33.

149. *Jameel and others (Respondents) v Wall Street Journal Europe SpA (Appellants)*, [2006] UKHL 44 at para 158, [2007] 1 AC 359 (HL (Eng)).

bright line test is significant, and its cost in terms of principle is arguably negligible.

These two approaches should be rejected in favour of a broad rule such as denying standing to institutions subject to access to information law. Given the lack of consistency regarding which entities are subject to access to information requests, the proposal is not unproblematic. However, denying standing to such institutions is a starting point, and one that offers both a rational basis (such institutions are in some sense public and access to information about them is important to government accountability) and an easily-applied test. Beyond this list, courts may consider whether an institution not subject to access to information laws should be denied standing to sue in defamation, and they can grapple with the question of what aspects of an institution make it worthy of diminished reputational protection.

6. *A total ban is justified*

Some have argued that a complete ban on defamation actions by public institutions is overkill because defamation law contains defences that mitigate the negative effect on democratic discourse.<sup>150</sup> These include fair comment, qualified and absolute privilege and, now, responsible communication on matters of public interest. The latter, which has existed in Canadian law since 2009, protects even false speech about a matter of public interest, so long as it was responsibly communicated.<sup>151</sup> Defamation defences might therefore seem like an appropriate compromise between denying standing to sue and defamation law's potentially harsh impact on valuable speech.

In brief, a complete ban is nevertheless appropriate because: (a) even with defences, defamation law chills and punishes valuable expression about public institutions; (b) defamation defences place too great an onus on defendants, such that defences insufficiently protect valuable speech; (c) it is not even clear that defamation law is effective at vindicating reputation, and there are alternative ways for public institutions to restore their reputations.

Defamation is especially easy to threaten, because what counts as defamatory is broad and because most of the onus lies with defendants. This increases the risk of a chilling effect on speech. If people believe that when they criticize their public institutions, they may have to engage in

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150. In addition to the plaintiffs in cases such as *Montague*, *supra* note 1 and *Halton Hills*, *supra* note 1, see Raymond Youngs, "Should Public Bodies Be Allowed to Sue in Defamation?" (2011) 16:1 Comms L 19.

151. *Grant*, *supra* note 103.

expensive litigation with a powerful and deep-pocketed plaintiff, dissent may be silenced even in situations where there would be nothing legally objectionable about the speech in question.<sup>152</sup> The existence of defences will often not limit the chilling effect because of the cost of access to justice. This was one of the reasons why the House of Lords in *Derbyshire* opted for a complete ban on government defamation actions rather than leaving courts to apply public interest defences.<sup>153</sup>

The chilling effect should not be overstated. Some people will not be deterred from speaking out. Others may recognize that an apology and retraction will often make a threatened claim go away. In some cases, it will be desirable to deter people from saying defamatory things. Nevertheless, the chilling effect of defamation law has been recognized as a problem by the Supreme Court of Canada even outside the context of speech about public institutions.<sup>154</sup> It is a problem to take seriously.

The second reason why defences are insufficient is that, given the elements of defamation law and its onus of proof, people with good reasons for speaking out may nevertheless lose their cases. Defamation law is plaintiff-friendly: it is strict liability and presumes falsity and damages. The burden of proving truth or another defence lies with the defendant. It is always possible that defendants with valid claims will lose because they are unable to afford the cost of defending or for whatever reason cannot prove their case. For example, in *Grant* the Supreme Court noted the possibility that a defendant might not be able to prove the truth of a true statement because of a lack of evidence.<sup>155</sup>

Some of this risk has been mitigated by the new defence of responsible communication on matters of public interest, which protects even false speech. Raymond Youngs implies that the similar UK defence helps strike the right balance because it only holds those responsible who act maliciously or otherwise fail to take reasonable steps to ensure the truth of their statement.<sup>156</sup> Yet there is reason to doubt that the responsible communication defence will adequately protect speech. First, the costs of litigation mean that even if a defendant could succeed on the merits of the responsible communication defence, she may prefer not to speak at all, to apologize or to settle her claim. Second, the defence requires

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152. Courts have acknowledged the chilling effect of defamation. See *Grant*, *supra* note 103 at para 53; *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326, [1989] SCJ No 124. For more on the chilling effect of defamation law, see Young, "Rethinking," *supra* note 126 at 557-558.

153. *Derbyshire*, *supra* note 24 at 547. ("The threat of civil action for defamation must inevitably have an inhibiting effect on freedom of speech.") See also *ibid* at 548.

154. *Grant*, *supra* note 103 at para 53.

155. *Ibid* at paras 56 and 65.

156. Youngs, *supra* note 150 at 24.

the defendant to have taken reasonable steps to verify the accuracy of the defamatory statement. It remains to be seen how courts will interpret this requirement. For example, Canadian courts have tended to reject the defence unless the defendant asked for the plaintiff's side of the story, as was generally the case in the U.K.<sup>157</sup> Third, in Canada at least, the defence has often been interpreted as applying only to media and bloggers—not to ordinary citizens speaking out about their governments.<sup>158</sup>

A third reason why a total ban is justified relates to the reason why a public institution would want to sue in defamation. Presumably, it would generally be to vindicate (that is, rehabilitate) its reputation rather than to recover special damages or general damages. Special damages are rarely pleaded in defamation<sup>159</sup> and general damages amounts are generally modest for non-human plaintiffs.<sup>160</sup> Deep-pocketed public institutions do not need to sue for compensatory damages. Rather, an institution would presumably only spend thousands of dollars of public money on a defamation action in order to vindicate its reputation.

Yet defamation law is arguably neither necessary nor even effective in vindicating a public institution's reputation. Whether it be through mailouts, advertising, websites, or through the media, public institutions already have the ability to speak to the public. This varies with the nature of the institution: the CBC has a greater ability to reach people than a school board has. Nevertheless, all public institutions have some capacity to communicate with the public. This capacity should not be overstated: some scholars have argued that institutions generally rely on the media to get their message across and they cannot control what is conveyed. Further, a correction by the institution may carry less weight than a court's finding of fact.<sup>161</sup>

157. Hilary Young, "Anyone...in Any Medium? The Scope of Canada's Responsible Communication Defence" in Andrew Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge, UK: Cambridge University Press, 2016) 17 [Young, "Anyone"]—see specifically fn 58.

158. See generally Young, "Anyone," *ibid*, referring to *Foulidis v Baker*, 2012 ONSC 7295, 224 ACWS (3d) 521; *Rubin v Ross*, 2010 SKQB 249, 358 Sask R 183; and *Roshard v St Dennis*, 2013 BCSC 1388, 231 ACWS (3d) 834.

159. *Hill*, *supra* note 122 at para 169 ("[in libel actions,] special damages for pecuniary loss are rarely claimed and often exceedingly difficult to prove.")

160. "That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages." *Walker v CFTO Ltd* (1987), 59 OR (2d) 104, at para 26 citing *Carter-Ruck on Libel and Slander*, 3rd ed (Salem, NH: Butterworths, 1985) at 156-157. Although the case was referring to corporations, the reason for a small award of general damages relates to the inability of corporations to suffer, which is also true of public institutions.

161. Youngs, *supra* note 150 at 25.

So public institutions have some ability to communicate in order to correct misinformation about themselves, but that ability is by no means a guarantee that they can rehabilitate their reputations on their own. It is far from guaranteed, however, that even a successful defamation action will rehabilitate an institution's reputation. In the context of corporate defamation plaintiffs, the author has argued that for the plaintiff's reputation to be vindicated, a number of things must happen: the plaintiff must succeed, the success must depend on the falsity of the statement (as opposed to a technicality), the victory must be publicized to the community to whom the original defamatory statement was published, that community must believe the verdict reflects the truth (as opposed to an inequality of arms, for example, as in the *McLibel* case),<sup>162</sup> and perhaps significant damages must be awarded.<sup>163</sup> In other words, the audience to whom the plaintiff was defamed must actually change its mind about the plaintiff. How often this actually happens is uncertain.<sup>164</sup>

#### 7. *A matter of standing rather than privilege*

Finally, the prohibition on public institution defamation actions should take the form of a denial of standing rather than the form of an absolute privilege, although most of the Canadian case law to date has referred to it as the latter.<sup>165</sup>

Whether the prohibition is a privilege or a denial of standing would likely rarely affect the outcome of a case. However, framing the prohibition as an absolute privilege could cause confusion. Recall that *Montague* recognizes an absolute privilege to speak "about issues relating to government"<sup>166</sup> while *Halton Hills* holds that "absolute privilege attaches to statements made about government."<sup>167</sup> This language refers to the subject matter of the speech rather than the identity of the plaintiff. The focus instead should be on the identity of the plaintiff rather than the subject matter of the speech in question (after all, much speech about corporations is also very important and worth protecting). A privilege based on subject matter—namely speech about government—could conceivably apply even where

162. *McDonald's Corporation v Steel & Morris*, [1997] EWHC 366 (QB).

163. See Young, "Rethinking," *supra* note 126 at 567-569.

164. For example, see the research cited in Hilary Young, "But Names Won't Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation" (2011) 37:1 *Queen's LJ* 1. Specifically, for confirmation bias, see Brendan Nyhan & Jason Reifler, "When Corrections Fail: The Persistence of Political Misperceptions" (2010) 32:2 *Political Behavior* 303.

165. *Montague*, *supra* note 1 at paras 29, 32; *Halton Hills*, *ibid* at para 62. But see *Ferguson*, *supra* note 99 at paras 15-16 (in which the court noted that while the Pension Board had legal personality, whether it could maintain a defamation action was a question of standing).

166. *Montague*, *supra* note 1 at para 32.

167. *Halton Hills*, *supra* note 1 at para 62.

the plaintiff is an individual affiliated with government. If, for example, the defendant says that a city is corrupt, the mayor might have a plausible defamation claim. Could the defendant rely on the absolute privilege to speak about government? The proposed prohibition is not grounded in the importance of the speech in question but in other factors unique to non-human and public institutions.

A further point is that the scope of the privilege might be unclear, leading to pointless debates about whether a particular statement is “about government.”

What the courts in *Montague* and *Halton Hills* actually seem to have intended was a privilege that applied only to government plaintiffs rather than to all speech about governments. After all, Pedlar J. in *Montague* refers to “an absolute privilege against the threat of a civil action for defamation *being initiated against them by their government*”<sup>168</sup> (emphasis added). Such a prohibition is better conceived of as a denial of standing than as an absolute privilege. This is especially so given the important role of qualified and absolute privilege in the law of defamation.

Privilege “is...any immunity which prevents the existence of a tort”<sup>169</sup> and can refer to situations where “the defendant has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the plaintiff.”<sup>170</sup> However, privileges in defamation law usually relate to occasions of speech.<sup>171</sup> Examples include where the speech occurs (e.g. in the course of parliamentary proceedings) or what it is about (e.g. fair reports of court proceedings). It focuses on the defendant’s immunity from suit rather than the plaintiff’s lack of justiciable interest in an action.<sup>172</sup>

Standing, on the other hand, is “the legal entitlement of [the entity or person in question] to invoke the jurisdiction of the Court.”<sup>173</sup> It relates to the right to sue in a particular instance.<sup>174</sup> This article proposes that public institutions would simply lack standing to bring defamation actions. There would be no need for the defendant to prove that the speech in question

168. *Montague*, *supra* note 1 at para 32 [emphasis added].

169. William Prosser, *Law of Torts*, 4th ed (St Paul: West Publishing Co, 1971) at 98.

170. *Ibid.*

171. See Patrick Milmo et al, eds, *Gatley on Libel and Slander*, 11th ed (London, UK: Thomson Reuters, 2008) at 13.1-461 re: absolute privilege [*Gatley*]; *Grant*, *supra* note 103 at para 94 re: qualified privilege.

172. *Gatley*, *ibid* at 13.1-464: “the practical effect of immunity from suit seems to be the same as that of absolute privilege.”

173. *Saanich Inlet Preservation Society v Cowichan Valley (Regional District)* (1983), 44 BCLR 121 at para 1.

174. Thomas Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 7.

falls within the scope of the privilege and no debate about whether the privilege only applies to public institution plaintiffs.

### *Conclusion*

This article has proposed that a large number of public institutions should be denied standing to sue in defamation. As far as the author is aware, no court or scholar has suggested a prohibition as broad as this. And yet, given what is actually at stake, the proposal is a relatively modest one.

Australia and the United Kingdom have recently eliminated or restricted the ability of corporations to sue in defamation. The reasons for this include the proprietary nature of a corporation's reputation, corporations' inability to suffer psychologically, and their ability to rehabilitate their reputations in other ways.<sup>175</sup> Yet the argument for prohibiting defamation actions is even stronger in relation to governments and public institutions than it is in relation to corporations. This is not because speech about governments is of greater public importance but rather because of the democratic and public nature of these institutions. If their ability to achieve their ends is affected because of a lie, then their recourse should be in trying to convince the public of the lie, rather than in civil litigation.

This may result in hardship: there may be circumstances in which lies are spread about a public institution, with the result that the institution is unfairly deprived of the ability to achieve its goals, or that it loses the opportunity to hire the best and brightest candidates for employment. Ultimately, however, permitting defamation actions is not a justifiable response to this risk. This is because of the nature of the reputational interest at stake, the risk to democratic participation, the ability of institutions to find other ways to correct the record and the fact that suing in defamation is, in any event, no guarantee of rehabilitating reputation. Existing defences are insufficient to protect the freedom of expression interests at stake because of the onus they place on defendants and because of their uneven track record in protecting speech on matters of public interest.

Defamation law predates the concept of corporate legal personality.<sup>176</sup> It was created in part to prevent blood feuds between members of the nobility.<sup>177</sup> Whether it could apply to protect corporate reputation was not obvious, but corporations were eventually granted the right to sue in defamation on the basis of their legal personality without much consideration of their different reputational interests. Although they could suffer no emotional injuries, they had a proprietary interest in reputation

175. AG Report, *supra* note 126 at 13.

176. *Ibid.*

177. Hill, *supra* note 122 at para 117.

that was often a valuable asset. The analogy was then extended to municipal corporations on the basis that like other corporations, they were granted, by statute, the rights of legal persons.<sup>178</sup> Throughout this development, few questioned whether it actually made sense to allow public institutions recourse to defamation law.

This is beginning to change. All the common law jurisdictions surveyed now prohibit defamation actions by governments, including municipalities. Courts and academics are recognizing that there are good reasons not to treat government reputation the same way as human reputation, and perhaps even corporate reputation. The interests at stake are significantly different, such that the applicable laws should be different.

Although there is agreement that governments cannot sue in defamation, it is unclear which public institutions count as government for the purposes of the prohibition. Several guiding principles have been suggested, such as whether the entity is democratically elected or whether it performs traditionally governmental functions. These approaches have certain benefits, but tend to treat what it means to be government narrowly. Further, these approaches do little to address the uncertainty as to which institutions can and cannot sue. Instead, this article has proposed that, as a starting point, those entities subject to access to information law should be denied standing to sue in defamation. They are non-human entities without a dignitary interest in reputation. They are in some sense public and they are all institutions about which public access to information is important for government accountability. It follows that it is important for the public to be able to speak about these institutions. Defamation law can pose a serious threat to such speech, and it should have no place in resolving disagreements about a public institution's quality or conduct.

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178. See *Bognor*, *supra* note 25 and *Prince George*, *supra* note 59.



